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We also, in this paper, leave untouched the general question of the value of the jury system. When such able and thoughtful men as Prof. EMORY WASHBURN and Prof. JAMES V. CAMPBELL appear as its champions, after all the adverse criticism that recently has been lavished upon it, we may feel assured that there are still reasons in its support which lie deep in the philosophy of the human mind.¹

T. M. C.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

CHARLES T. CROMWELL v. THE COUNTY OF SAC.

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

In an action against a county in Iowa upon certain interest coupons originally attached to bonds issued by the county for the erection of a court-house, it was found and determined that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value; and, inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover: *Held*, that the judgment did not estop the plaintiff holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing in a second action against the county that he acquired such other bonds and coupons for value before maturity.

The finding in one action that the plaintiff therein is the holder and owner of certain coupons in suit, does not estop the defendant from showing in another

doctrine had not generally been accepted, but the liability to a second punishment is not to be overlooked in any consideration of the true bearings of these cases. In the recent case of *Storey v. People*, 79 Ill. 45, the Supreme Court of Illinois decide, as we understand it, that the constitutional guaranty of freedom of speech and of the press precludes the court punishing, as a contempt of its authority, a libel in a newspaper upon the court or its officers not directly calculated to hinder, delay or obstruct the court in the exercise of its proper functions.

¹ Reference is here made to the paper by Prof. WASHBURN in the *Forum*, vol. 3, p. 601, and to that by Prof. CAMPBELL in the *Michigan Lawyer* 1876.

action that such plaintiff prosecuted the first action for the use and benefit of the plaintiff in the second action. The finding only establishes the fact that such plaintiff held the legal title to the coupons, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

IN error to the Circuit Court of the United States for the district of Iowa.

This was an action on four bonds of the county of Sac, in the state of Iowa, each for \$1000, and four coupons for interest, attached to them, each for \$100. The bonds were issued in 1860, and were made payable to bearer, in the city of New York, in the years 1868, 1869, 1870, and 1871 respectively, with annual interest at the rate of ten per cent. a year.

To defeat this action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff, Cromwell, was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

The opinion of the court was delivered by

FIELD, J.—The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no

proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East 346, the defendants were held estopped from averring title to a mine in an action of trespass for digging out coal from it, because in a previous action for a similar trespass they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case Lord ELLENBOROUGH, in his elaborate opinion, said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue

joined, solemnly found against them." And in the case of *Gardner v. Buckbee*, 3 Cowen 120, it was held by the Supreme Court of New York, that a verdict and judgment in the Marine Court of the city of New York upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas. The rule laid down in the celebrated opinion in the case of the *Duchess of Kingston* was cited, and followed: "That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court."

These cases usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that if not thus involved the judgment would be inoperative as an estoppel. In the case of *Miles v. Caldwell*, 2 Wall. 35, a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein, as a bar or estoppel, in the same position as other actions, was held by this court conclusive, in a subsequent suit in equity between the parties respecting the title, upon the question of the satisfaction of the mortgage under which the plaintiff claimed title to the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action, and had been passed upon by them. The court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them: and by inevitable implication also held that in the absence of proof in such cases the verdict and judgment were inconclusive, except as to the particular trespass

alleged, whatever possible questions might have been raised and determined.

But it is not necessary to take this doctrine as a matter of inference from these cases. The precise point has been adjudged in numerous instances. It was so adjudged by this court in the case of *The Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 24 How. 333. In that case an action was brought upon a special parol contract for the use of Sickles's cut-off for saving fuel in the working of steam-engines, by which the plaintiffs, who had a patent for the cut-off, were to attach one of their machines to the engine of the defendants' boat, and were to receive for its use three-fourths of the saving of fuel thus produced, the payments to be made from time to time when demanded. To ascertain the saving of fuel an experiment was to be made in a specified manner, and the result taken as the rate of saving during the continuance of the contract. The plaintiffs in their declaration averred that the experiment had been made, the rate of saving ascertained, and that the cut-off had been used on the boat until the commencement of the suit. In a prior action against the same defendant for an instalment due, where the declaration set forth the same contract in two counts, the first of which was similar to the counts in the second action, and also the common counts, the plaintiffs had obtained verdict and judgment, and it was insisted that the defendant was estopped by the verdict, and judgment produced from proving that there was no such contract as that declared upon, or that no saving of fuel had been obtained, or that the experiment was not made pursuant to the contract, or that the verdict was rendered upon all the issues, and not upon the first count specially. The Circuit Court assented to these views and excluded the testimony offered by the defendants to prove those facts. But this court reversed the decision, and held that the defendants were not thus estopped.

"The record produced by the plaintiffs," said the court, "showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of

the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial; or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding: *Boyleau v. Rutlin*, 2 Exch. 665, 681, and *Hughes v. Alexander*, 5 Duer 493.

The case of *Howlett v. Tarte*, 10 C. B. N. S. 813, supports this view. This was an action for rent under a building agreement. The defendant pleaded a subsequent agreement changing the tenancy into one from year to year, and its determination by notice

to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer the replication, after full argument, was held bad. In deciding the case Mr. Justice WILLES said: "It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. * * * I think we should do wrong to favor the introduction of this new device into the law." Mr. Justice BYLES said: "It is plain that there is no authority for saying that the defendant is precluded from setting up this defence." Mr. Justice KEATING said: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

The language of the Vice-chancellor, in the case of *Henderson v. Henderson*, 3 Hare 100, 115, is sometimes cited as expressing a different opinion, but upon examining the facts of that case it will appear that the language used in no respect conflicts with the doctrine we have stated. In that case a bill had been filed in the Supreme Court of Newfoundland by the next of kin of an intestate against A. and others for an account of an estate and of certain partnership transactions. A decree was rendered against A., upon which the next of kin brought actions in England. A. then filed a bill there against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him, and alleging various errors and irregularities in the proceedings in the Supreme Court of the island, and praying that the estate of the intestate might be administered, the partnership accounts taken, and the amount of the debt due to him ascertained and paid. A demurrer to the bill was allowed for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before that court. It was with reference to the necessity of having the subject of particular litigation as a whole at once before the court

and not by piecemeal, that the Vice-chancellor said: "In trying this question I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground.

If now we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of Smith, that the county of Sac, by a vote of its people, authorized the issue of bonds to the amount of ten thousand dollars for the erection of a court-house; that bonds to that amount were issued by the county judge and were delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately upon receipt of the bonds, the contractor gave one of them as a gratuity to the county judge; and that the court-house was never constructed by the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become before their maturity the holder of twenty-five coupons which had been attached to the bonds; but there was no finding that he had ever given any value for them. The court below held upon these findings that the bonds were void as against the county and gave judgment accordingly. The case

coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds as to call upon the holder to show that he had given value for the coupons, and not having done so, the judgment was affirmed. Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them; and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds, affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds as against the county must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a *bonâ fide* holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.

Upon the second question presented we think the court below ruled correctly. Evidence showing that the action of Smith was brought for the sole use and benefit of the present plaintiff was, in our judgment, admissible. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of

the action, and was not inconsistent with an equitable and beneficial interest in another.

Judgment reversed and cause remanded for a new trial.

CLIFFORD, J., dissented.

It is laid down in the principal case that "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel * * * as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." There is, however, a line of decisions which narrows the estoppel to the matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading. It is the object of this note to indicate the current of authority on this point, and especially the tendency of the modern decisions.

It can hardly be doubted that if the cause of action be decided upon a title which is brought into issue by the pleadings and made part of the record, the verdict and judgment in that action will estop parties and privies in estate from disputing, not only the claim or demand in controversy, but the title which has thus been solemnly passed upon by a court of concurrent jurisdiction. The diversity of judicial opinion arises when it is sought to include in the estoppel facts necessarily involved in the finding, or shown by parol to have been the ground of such finding, but not the matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading.

The leading English case on this subject is *Barrs v. Jackson*, 1 Y. & C. C. C. 585. Harriet Smith having died intestate, application for letters of administration on her estate was made both by Barrs and Jackson. The Ecclesiastical Court decided that Jackson was the lawful second cousin and next of kin of the intestate, and that Barrs had

failed in proof that she was the lawful niece of the intestate; and granted administration to Jackson. A bill was then brought in chancery by Barrs against Jackson as administrator praying for account and payment over to her as next of kin of the intestate. The defendant by his answer relied on the proceedings in the Ecclesiastical Court. The plaintiff offered fresh evidence of her relationship to the intestate. Vice-Chancellor Knight BRUCE granted an issue, saying: "It is I think to be collected that the rule against re-agitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision * * * those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come into question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object." On appeal, however (s. c. 1 Phillips 582), the decree was reversed by Lord Chancellor LYNDHURST, who held himself bound by *Bouchier v. Taylor*, 4 B. P. C. 708, and reconciled the cases by the rule that matters directly put at issue and decided between the same parties are concluded, but not matters which are only to be inferred from the judgment. The case of *Outram v. Morewood*, 3 East 346, is directly to the point that "the matter alleged by the party and on which the recovery proceeds," creates the estoppel; and *Carter v. James*, 13 M. & W. 137, is not in conflict with this decision. All which is involved in that case is that no estoppel arises as to facts not of record,

which might have been, but were not, controverted in the previous action. See to the same effect *Howlett v. Tarte*, 10 C. B. N. S. 813. There are also a class of cases on the settlement of paupers, where the justices' order of removal has been held conclusive, not only of the status of the pauper, but of all facts necessary to their finding. Compare *Regina v. Sow*, 5 Q. B. 93, with *Regina v. Hartington*, 4 E. & B. 780. "A judgment concludes," says COLERIDGE, J., in the latter case, after an examination of the *Duchess of Kingston's Case*, "not merely as to the point actually decided, but as to matter which it was necessary to decide, and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue." *Regina v. Sow* is to the same effect, except that the court refused to receive the examinations in evidence to show on what ground the order of removal had been made; COLERIDGE, J., saying: "The order is conclusive as to what is necessarily involved in it; but the question is whether you can prove in this way that a particular fact was so, the fact not appearing on the face of the order." And no case has been found in the English reports which permits verbal evidence to be given that facts not necessarily involved in the finding were the only matters at issue, for the purpose of estopping the parties from contesting those facts in a subsequent proceeding.

In America the current of authority is in favor of admitting parol evidence to show on what point the finding was reached. The doctrine is thus expressed by CAMPBELL, J., in *Packet Co. v. Sickles*, 24 How. 333, "It is not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover or the validity of the defence depended, for it to operate conclusively; but only that the same matter might

have been litigated, and extrinsic evidence will be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury." When the same case came up in 1866 (5 Wall. 580), it was said by the court, "If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." See also the dissenting opinion of MILLER, J.

The majority of the state courts have arrived at a similar conclusion; and the tendency of the later cases is markedly towards allowing the actual point on which the decision turned to be given in evidence, though not indicated by the pleadings or judgment, for the purpose of making an end of litigation. This is said in some cases to be a result of the loose modern system of pleading, which renders it often impossible to ascertain from the record the real issue before the jury. See *Packet Co. v. Sickles*, 24 How. 343; *Sawyer v. Woodbury*, 7 Gray 499.

The narrower rule will be well illustrated by the decision in *King v. Chase*, 15 N. H. 9. This was an action in trespass for taking certain hay, the title to which was in the plaintiff by virtue of a certain mortgage. The defendant gave in evidence the record of a former action in trover for taking oats described in the same mortgage; verdict, not

guilty. He then offered parol evidence to show that the only question submitted to the jury and determined by them was as to the fraudulent character of the mortgage under which the plaintiff claimed. The court below received the evidence, and the jury found for the defendant; but the Superior Court set aside the verdict and granted a new trial. PARKER, C. J., laid down the distinction that while parol evidence was admissible to show that the verdict in the former action was given on the plaintiff's want of title to the oats, as distinguished from the defendant's conversion, it was not admissible to prove on what ground the verdict proceeded. "The title which has been tried was only his (the plaintiff's) title to the oats. The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title. But the mortgage was not the matter in issue." The rule thus laid down is affirmed in *Palmer v. Russell*, 43 N. H. 625, where the question is treated as settled in that state by the authority of *King v. Chase*.

Some of the earlier New York cases are to the same effect: *Lawrence v. Hunt*, 10 Wendell 88; *Manning v. Harris*, 2 Johns. 24. But see *contra*, *Burt v. Sternburgh*, 4 Cowen 559, 562; *Gardner v. Buckbee*, 3 Id. 120; and *Jackson v. Wood*, 3 Wendell 278, where the question was thoroughly argued, the Court of Errors overruling the decision below. The later cases have followed in this path. Thus in *Frantz v. Ireland*, 4 Lansing 278 (1871), where, as an estoppel in an action for land, the record of a previous judgment was introduced in which no land was described, parol evidence was admitted to show that the title to the same land was thereby determined; TALCOTT, J., saying that, where it was not inconsistent with the record, "the party seeking to avail himself of the former recovery may show by parol or other-

wise that the precise point was litigated and determined." *Demarest v. Darg*, 32 N. Y. 281, is directly in point. In *Bissell v. Kellogg*, 60 Barb. 617 (1871), a specification by the judge of the ground of his finding was held conclusive in a subsequent suit. In *Bissick v. McKenzie*, 4 Daly 265 (1872), a previous action had been brought on two promissory notes, the defence to which was that these notes, together with a balance on book account, had been paid by giving a bond and mortgage. A verdict for the plaintiff in this case was held conclusive in a subsequent suit for the balance on book account, in which the same defence was set up. See, finally, *Bush v. Knox*, 2 Hun 576 (1874), where the decisions are reviewed, and the court says, "No cases are cited of a recent date which conflict with the principle laid down" in *Demarest v. Darg*.

In Pennsylvania, *Hibshman v. Dulleban*, 4 Watts 183, and *Lentz v. Wallace*, 5 Harris 114, seem to affirm the principle of *King v. Chase*. In *Hibshman v. Dulleban*, the finding of the Orphans' Court, *inter alia*, that a release of legacy was valid, was held not to estop the litigation of that question by an action on the case for the legacy; but note that the Orphans' Court had no jurisdiction over such an action, and so it was said by HAYS, J., below; note also that the point was not necessarily decided, as the same conclusion would have been reached by the Orphans' Court on other grounds; it was a "gratuitous determination." In *Lentz v. Wallace*, parol evidence offered to supplement the record was rejected, apparently on the ground that the party might have filed a bill of particulars. "The notes of judge and counsel, even when supported by the testimony of 'one of the jurors,' furnish but imperfect and uncertain means of ascertaining the real ground of the former decision;" *per* LEWIS, J. *Tams v. Lewis*, 42 Penna. St. 402, sometimes cited on the same side, is in

reality an authority against it. There was held to be no estoppel in that case, as the facts, though traversed in the previous action, were immaterial to its decision; but, *per* STRONG, J., "a former verdict and judgment between the same parties is conclusive of every fact which was essential to the adjudication * * * either from the record or aliunde." *Lewis & Nelson's Appeal*, 17 P. F. Smith 153, does not appear to conflict with this dictum. The broader principle was laid down in *Peterson v. Lathrop*, 11 Casey 222, where a verdict that the discharge of a bankrupt had been obtained by fraud was held conclusive of the fraud; and in *Stevens v. Hughes*, 7 Casey 381. The law on this point, however, has not yet received any conclusive and authoritative settlement in Pennsylvania.

The Massachusetts cases were reviewed in *Burlen v. Shannon*, 99 Mass. 200 (1869), by FOSTER, J., to the effect that all facts necessary to the previous judgment are conclusively established "upon the obvious principle that when a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion, and that parol proof is admissible to show what question only was submitted to the jury." In the especial case before him, he decided that there was no estoppel to contest a fact upon which the former judgment was not necessarily based. In *Bates v. Santom*, 116 Mass. 120, it was held that evidence that the same facts had been passed upon in a different claim should have been admitted. The law may, therefore, after much judicial hesitation and doubt, be considered as settled in this state.

To the same effect are the decisions in Alabama (*Chamberlain v. Gaillard*, 26 Ala. 504), California (*Jackson v. Lodge*, 36 Cal. 28), Connecticut (*Smith v. Sherwood*, 4 Conn. 276), Maine

(*Chase v. Walker*, 26 Maine 555), Missouri (*Ridgley v. Stilwell*, 37 Mo. 128) and Ohio (*Babcock v. Camp*, 12 Ohio N. S. 11).

No case has been found within the last ten years which explicitly lays down the narrower rule, and it is believed that even in New Hampshire it would now be disavowed. The reasoning of Mr. Bigelow in his valuable work appears to be conclusive on this head. Estoppel by judgment is founded upon the reasonable doctrine that where a party has had his day in court, when he has had full opportunity of establishing or refuting certain facts, those facts shall not again be drawn into controversy. The protection of this doctrine should, therefore, extend to the substantial issue at the trial, on which the case turned, and to which the minds of parties, judge and jury were directed. See Bigelow on Estoppel, 2d ed., p. 88, n. 4.

That this reasoning has availed to extend the scope of estoppel by judgment in this country will appear from a comparison of REDFIELD, J.'s, opinion in *Gray v. Pingry*, 17 Verm. 419, with his note to *Piper v. Gilmore*, in the Am. Law Reg. N. S., vol. 3, p. 590. In the former case, after discussing the general doctrine, he goes on to say that if the matter be not specially pleaded, "it is said" that the record and finding in the previous case are not conclusive; and adds: "My own opinion is that the former finding, even when it is necessary to resort to oral evidence to ascertain that the fact in dispute was involved in the former controversy, is still conclusive on the parties, and of course on the jury." In his note to *Piper v. Gilmore*, "We have long been impressed with the wonderful advance made by the American courts in the last thirty years, in giving a conclusive effect to estoppels of all kinds * * *. It seemed to us that this last case (*Gray v. Pingry*) carried the doctrine of estoppels of record to the

utmost verge, the very *ultima thule* of the law at that time. But it has already advanced far beyond the point there assumed * * *. We have always regarded the rule of law by which a former verdict is made to apply as an estoppel to matters and questions not defined upon the record, and which cannot be determined in any after-proceeding without resort to parol proof, involving an inquiry into the deliberations of the jury-room, as having carried this doctrine quite up to the extreme limit of safety." But the doctrine has not halted at the point indicated by the learned judge, and the result of the later cases may be thus summed up:—

I. That a verdict and judgment are conclusive of all matters upon which the finding is based: that is,

- (1) Of all matters necessarily presupposed by the finding;
- (2) Of all matters shown to have been the basis of such finding.

II. That parol evidence is admissible to show what facts, not inconsistent with the record, were necessarily or actually the ground of the finding.

III. It may be added that proof either by the record or *aliunde*, that a certain issue was passed on at the previous trial, will not render the finding an estoppel as to that issue, unless it was necessarily involved in the decision. The extreme doctrine that any fact shown to have been submitted to the jury, and on which the finding might have been based, will be considered as adjudicated between the parties, has been strenuously denied and discredited. When the facts are not necessarily involved in the previous finding, the burden should apparently be in every case upon the party alleging the estoppel to show that these facts, and no others, were the ground of such finding.

RICHARD S. HUNTER.

Supreme Judicial Court of Massachusetts.

COMMONWEALTH v. JOHN F. COSTELLO.

A defendant, in an indictment for forgery, has no right to be personally present at the hearing of a motion in his behalf for a new trial; and his absence, though in jail, will not invalidate a sentence subsequently passed upon him when he is present.

The court will not hear or determine such a motion if the defendant is not within its control; not because he is entitled to be present, but because the court will not hear him unless he is there to abide by the decision.

INDICTMENT for forgery. At the trial in the Superior Court, the defendant was found guilty, and, before sentence, filed a motion for a new trial. This motion was heard and overruled in the absence of the defendant, while he was confined in jail. Neither the defendant nor his counsel expressed a wish that he should be present at the hearing.

The defendant, on being called up for sentence, filed a motion in arrest of judgment for the following reasons:—

"1. It does not appear of record that he was present when and while the motion for a new trial was heard and tried, and when the